

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARL R. OWENS)	
Claimant)	
VS.)	
)	Docket Nos. 098,734 & 160,288
GREAT PLAINS MANUFACTURING, INC.)	
Respondent)	
AND)	
)	
SAFECO INSURANCE CO. OF NORTH AMERICA & AETNA CASUALTY & SURETY)	
Insurance Carriers)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award by Administrative Law Judge Bruce E. Moore dated March 15, 1996.

APPEARANCES

Claimant appeared by his attorney, John M. Ostrowski of Topeka, Kansas. Respondent and its insurance carrier, Safeco Insurance Company of North America, appeared by their attorney, Brian J. Fowler of Kansas City, Missouri. Respondent and its insurance carrier, Aetna Casualty & Surety, appeared by their attorney, Edward D. Heath, Jr., of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jeffrey E. King of Salina, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations identified in the Award and has reviewed and considered the record identified in the Award.

ISSUES

Claimant underwent bilateral hip replacement after a work-related low back injury on June 7, 1991. Claimant contends that the hip surgery was a compensable result of the June 7, 1991, back injury. In the alternative, claimant contends that the hip replacement was a natural and probable consequence of a 1981 accident which resulted in what the District Court then found to be a compensable injury to both hips. The former theory is pursued under Docket No. 160,288 and the latter is pursued as a review and modification of the Award under Docket No. 098,734.

The Administrative Law Judge found that the hip injuries and surgery did not arise out of employment but were, instead, the result of a progressive preexisting disease. He denied benefits. Respondent was insured by Safeco Insurance Company of North America for the 1981 injury and by Aetna Casualty & Surety for the 1991 injury. Respondent and both insurance carriers deny that the claim for the hip injuries is compensable under either theory. Aetna Casualty & Surety asserts that if the claim is compensable for the 1991 injury then all or a portion of the expense should be paid by the Kansas Workers Compensation Fund. Claimant contends that the hip injuries are compensable, and he should be entitled to benefits based upon a 36 percent permanent partial functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be reversed as to Docket No. 160,288 and affirmed as to Docket No. 098,734. Claimant should be awarded benefits based upon a 36 percent permanent partial functional impairment. The expense of treatment for the hip condition and the resulting 36 percent disability should be borne by the Fund.

Claimant suffers from a long-standing degenerative arthritic condition in his hips. In 1981 claimant suffered an injury in the course of his employment which was determined to be an aggravation of his preexisting arthritis. Claimant was awarded permanent benefits based upon a 30 percent permanent partial disability to the body as a whole. Twenty-five percent of this award was attributed to claimant's hip injury and an additional five percent to a shoulder injury. The 1981 claim was under Docket No. 098,734 and is presently before the Appeals Board on an application for review and modification. On June 7, 1991, claimant suffered a back injury when he leaned over to pick up a piece of a large drill. Claimant had also suffered a temporary injury to his back in 1989.

After the June 1991 injury to his back, claimant underwent replacement of his right hip in December 1991 and replacement of his left hip in July 1992. As above indicated, claimant now contends that the hip replacement was either a natural and probable consequence of the 1981 injury or a compensable consequence of the low back injury in 1991.

The Appeals Board finds no evidence in the record to support the contention that the hip injury is a natural and probable consequence of the 1981 accidental injury. The only physician who testified in this case, Alan L. Kruckemyer, M.D., provides no opinion or testimony which would suggest or support this conclusion. The record as a whole indicates claimant's arthritic hip condition was one which would naturally progress. The evidence also indicates that claimant had contemplated, for approximately 20 years, the possibility of hip replacement. None of the evidence indicates the 1981 injury accelerated the hip surgery or otherwise caused the need for hip surgery.

The Appeals Board finds, on the other hand, the June 7, 1991, accident did accelerate the hip surgery. The key testimony supporting this conclusion is found in the deposition of Dr. Kruckemyer, the treating physician. Dr. Kruckemyer testified that claimant had preexisting flexion contractures of his hips. The hip condition caused him to hyperextend and strain his lower back. While there is no evidence that the 1991 accident directly injured the hip or aggravated the hip problems, Dr. Kruckemyer states in his medical records, and confirms in his deposition, the following connection:

"I think that if all he had were his hip problems he probably could delay his surgery for a few years, since he states during his driving activities at work he does very well. With the addition, however, of the back injury, I think as long as he has the flexion contractures of his hips he will continue to have increased low back pain from his increased lumbar lordosis and I am hopeful that with his hip replacements, not only will he get relief from hip pain, but also the lower back pain."

The Appeals Board finds from the testimony of Dr. Kruckemyer that the injury of June 1991 caused claimant to undergo the hip replacement earlier than he would have otherwise. The Appeals Board concludes that this nexus is sufficient to render that surgery and resulting disability compensable under the Kansas Workers Compensation Act. Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 611 P.2d 180 (1980).

Dr. Kruckemyer provides the only testimony regarding the extent of impairment attributable to the hip condition. He rates the impairment as 20 percent to each hip which he combines to a resulting 36 percent impairment to the body as a whole. The evidence contains no rating of permanent impairment in the back. Claimant returned to work and claims no additional work disability. Even if this functional impairment represents an aggravation of the 1981 injury, claimant is entitled to the full 36 percent. Ours v. Lackey, 213 Kan. 72, 515 P.2d 1071 (1973). The Appeals Board, therefore, finds and concludes that claimant is entitled to benefits based upon a 36 percent general body disability.

The Kansas Workers Compensation Fund (Fund) denies that it has liability for any of the benefits awarded. The Fund is liable when the employer knowingly employs or retains a handicapped employee who then suffers a compensable injury which was caused or contributed to by that handicap. K.S.A. 1987 Supp. 44-567. The Fund correctly points

out there is no evidence of a relationship between the current back injury and a preexisting condition. In fact, the doctor testified that the back injury could have occurred from lifting the grain drill without any prior problems. In addition, there was no testimony the employer had knowledge of any prior back problems. The Appeals Board, therefore, finds that the Fund has no liability for any temporary total disability or medical benefits attributable solely to the back injury.

The injury to the hips presents different issues. Again, no medical expert directly states that the preexisting hip condition caused or contributed to the hip surgery and resulting disability. The Appeals Board, nevertheless, finds and concludes that the hip surgery and resulting disability would not have occurred but for the preexisting condition. This is the necessary conclusion from other evidence in the record. As indicated, the injury in June 1991 did not cause direct injury to claimant's hips. The hip surgery, according to Dr. Kruckemyer, was performed to correct a preexisting hip condition and alleviate the problems with the back. This would not have occurred but for the preexisting hip condition. The respondent had knowledge of the preexisting hip condition, and the Board finds that condition did constitute a handicap. The Appeals Board, therefore, finds that the Fund should be liable for the expense of treatment for the hip condition, including the hip replacement surgery, and for the 36 percent permanent partial disability benefits.

The cost of treatment solely for the back injury and temporary total disability attributable to the back injury should be paid by respondent and its insurance carrier for the June 1991 date of accident. The record shows total amounts of medical expense and temporary total disability but does not provide a breakdown. The Board considers all temporary total disability and all medical expense for treatment for the back prior to the first hip replacement in December 1991 to be the obligation of respondent and its insurance carrier. The Fund is responsible for the cost of the hip replacement and subsequent treatment for the hips, is responsible for any temporary total disability after the first hip replacement, and is responsible for permanent partial disability. Disputes, if any, regarding division of these costs between the Fund and respondent shall be presented to the Administrative Law Judge.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Administrative Law Judge Bruce E. Moore, dated March 15, 1996, should be affirmed as to Docket No. 098,734 but reversed as to Docket No. 160,288. Claimant is awarded benefits for a 36% permanent partial general disability in Docket No. 160,288.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Carl R. Owens, and against the respondent, Great Plains Manufacturing, Inc., and its insurance carrier, Aetna Casualty & Surety, and the Kansas Workers Compensation Fund for an accidental injury which occurred June 7, 1991, and based upon an average weekly wage of \$611.49

for 108.43 weeks of temporary total disability compensation at the rate of \$278 per week or \$30,143.54, followed by 306.57 weeks at the rate of \$146.76 per week or \$44,992.21, for a 36% permanent partial general disability, making a total award of \$75,135.75.

As of June 30, 1997, there is due and owing claimant 108.43 weeks of temporary total disability compensation at the rate of \$278 per week or \$30,143.54, followed by 208 weeks of permanent partial compensation at the rate of \$146.76 per week in the sum of \$30,526.08 for a total of \$60,669.62, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$14,466.13 is to be paid for 98.57 weeks at the rate of \$146.76 per week, until fully paid or further order of the Director.

Temporary total disability benefits and costs of medical treatment prior to the first hip surgery should be, and are, the responsibility of respondent and its insurance carrier. The cost of hip treatment and temporary total disability for periods after the first hip surgery are the responsibility of the Workers Compensation Fund. All payments for permanent partial disability benefits are the responsibility of the Workers Compensation Fund.

The Appeals Board approves and adopts all other orders by the Administrative Law Judge.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Brian J. Fowler, Kansas City, MO
Edward D. Heath, Jr., Wichita, KS
Jeffrey E. King, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director